May 27, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Ex parte* communication in *Inquiry Concerning Deployment of Advanced Telecommunications Capability To All Americans In A Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* GN Docket No. 04-54**

Dear Ms. Dortch:

The Industry Rights of Way Working Group ("IROW") hereby submits the attached response to certain comments and reply comments regarding rights-of-way issues raised in the Federal Communications Commission's Notice of Inquiry in the above-referenced matter. Specifically, IROW addresses those comments and replies filed by The National Association of Telecommunications Officers and Advisors, the Alliance for Community Media Broadband deployment, the United States Conference of Mayors, National Association of Counties, American Public Works Association, Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, and the Mount Hood Cable Regulatory Commission, City of White Plains, Federal Communications Commission Intergovernmental Advisory Committee, and Town of Colonie, New York.

Respectfully submitted,

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Introduction

The Industry Rights of Way Working Group (“IROW”) hereby submits this response to certain comments and reply comments regarding rights-of-way issues raised in the Federal Communications Commission's Notice of Inquiry ("NOI") in GN Docket No. 04-54.[1] Specifically, IROW addresses those comments and replies filed by The National Association of Telecommunications Officers and Advisors, the Alliance for Community Media Broadband deployment, the United States Conference of Mayors, National Association of Counties, American Public Works Association, Texas Coalition of Cities for Utility Issues, Montgomery County, Maryland, the Mount Hood Cable Regulatory Commission, and the Intergovernmental Advisory Committee (“Opposing Local Government Commentors”). IROW strongly disagrees with the assertions of these groups that access to public rights-of-way ("ROW") is open and unfettered by actions of state and local governments. To the contrary, IROW member companies and other carriers continue to experience difficulty with some state and local governments regarding access to ROW for the deployment and provisioning of advanced services, telecommunications, and broadband networks. The continued existence of these difficulties is evident by the endurance of the IROW working group, which consists of members of the telecommunications industry that, in other respects, are highly competitive with divergent policy views. Any telecommunications issue that convenes ILECs, CLECs and IXCs as a unified

[1] Notice of Inquiry in the Matter of Inquiry Concerning Deployment Of Advanced Telecommunications Capability To All Americans In A Reasonable And Timely Fashion, And Possible Steps To Accelerate Such Deployment Pursuant To Section 706 Of The Telecommunications Act of 1996, FCC 04-55, GN Docket No. 04-54, ¶¶ 38-40 (rel. Mar. 17, 2004) ("NOI").

group deserves attention from the Federal Communications Commission.

As the Commission noted in the NOI, advanced services play a vital role in the nation's economy and the life of the American people. Advanced services have increased the efficiencies of American businesses, created new jobs, expanded educational opportunities and have improved the standard of healthcare, particularly in rural areas. Moreover, in a recent speech, President Bush articulated his goal of making broadband technology available to every corner of our country by the year 2007.

This NOI is crucial in identifying the remaining obstacles that may deter the achievement of this worthy goal. The nation's telecommunications carriers are uniquely positioned to build the networks necessary to provide new and advanced broadband services and applications to consumers and are doing so today. However, despite the Commission's efforts to encourage the adoption of model principles and practices by local municipalities that could facilitate broadband deployment, telecommunications carriers continue to face onerous rights-of-way requirements in some areas that are impeding their ability to build the new networks that are necessary to ensure widespread availability of broadband services.

It is ironic that Section 253 of the Telecommunications Act of 1996, designed to eliminate barriers to the rapid deployment of competitive networks, has sometimes had the opposite effect. Since its enactment, Section 253 has spawned actions by some local governments to impose new regulatory requirements and revenue-generating fees on telecommunications providers.

Although the language of subsection (c)[2] was intended to set limits and preserve the status quo, local governments have used this language to assert authority over telecommunications providers that belie the overarching intent of the section.

The Commission must ensure that telecommunications providers obtain timely access to the public rights-of-way and that "fair and reasonable compensation" does not exceed the actual and direct costs incurred by a jurisdiction arising from managing a provider's access to the public rights-of-way. IROW supports rights-of-way Recommended Measures, as outlined in Exhibit 1, and urges the FCC not to take any action or to allow state or local governments to take action counter to IROW's Recommended Measures that would impede broadband deployment.

I. Certain State and Local Governments Continue to Impose Barriers to Entry Through ROW Practices .

Assertions by Opposing Local Government Commentors regarding the minimal impact of state and local government action on deployment are overly simplistic and misstate IROW's position. Contrary to their claim, IROW has never claimed that municipal regulation is the sole cause in every instance for failure to deploy facilities. Many factors, such as market demographics, availability of facilities, and other non-local regulatory issues, can impact deployment in a given

[2] "Nothing in this section affects the authority of a state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers on a competitively and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government." 45 USC § 253(c).

market. However, IROW maintains that unnecessary regulation by state and local governments does continue to delay or prohibit deployment.

Moreover, the suggestion made by local governments that local, state, and federal agencies have *not* created barriers contradicts the growing recognition by various state and federal policy-makers, regulators, legislators and industry organizations such as NARUC and NTIA,[3] and the American Legislative Exchange Council, as well as state and federal courts. As NARUC recognized in its 2002 Resolution on Access to Public Rights-of-Way and Public Lands:

> Prompt, non-discriminatory access to public rights-of-way and public lands and reasonable rates, terms, and conditions is essential to the development of facilities-based competition, the deployment of state-of-the-art telecommunications services to the public and the implementation of facilities-based/broadband network redundancy to safeguard against network outages.

Furthermore, the number of complaints or lawsuits alone is not indicative of whether a problem exists. As then-Assistant Secretary Nancy Victory recognized in her February 2002 address to NARUC, "Due to the nature of networks, only a few 'difficult' jurisdictions can have a disproportionately adverse effect on the roll-out of uninterrupted statewide or regional advanced services networks, which ultimately can impair national broadband coverage.[4] In fact, Velocita Corporation (once a member of IROW before its bankruptcy) maintained that such action directly contributed to its bankruptcy because it was unable to

[3]Address by Commerce Assistant Secretary Nancy J. Victory, *Together On The Right Track: Managing Access To Public Roads And Rights Of Way*, Before the National Association of Regulatory Utility Commissioners, Committee on Telecommunications Washington, D.C. February 12, 2002 ("Victory Address").
[4] *See* Victory Address.

deploy its network due to delays created by certain state and local governments.[5]

Delay affects all parties involved. It is devastating to new competitive telecommunications providers that seek to gain access to the marketplace for the first time and offer services to the public. It hurts existing telecommunications providers – ILECs, CLECs, and IXCs – that are seeking to deploy facilities for next generation services. Most of all, delay hurts consumers – including government, business, and residential customers – who face long and often unacceptable waiting periods to obtain such advanced telecommunications and broadband services.

II. State and Local Government ROW Functions Are Limited to Management of the ROW.

On numerous occasions, IROW has attempted to work with various state and local governments, collectively and individually, to resolve issues regarding unlawful rights-of-way access requirements. IROW has steadfastly recognized that local governments have the right and responsibility to manage the time, place and manner of accessing public rights-of-way for the placement of telecommunications or broadband facilities, and so have the courts.[6] Rather than manage rights-of-way, however, some local governments seek to exercise broader regulatory control over telecommunications providers and services. In many such cases, their regulatory regime mirrors that of a cable local franchise model rather than the regulatory structure established at the state and federal

[5] See attached letter from Elvis C. Stout, Velocita Corporation, to LSGAC (dated Aug. 21, 2002) ("Unreasonable delay and excessive fees imposed by a minority of local government entities is, and has been, the number one impediment to deployment of Velocita's nationwide network.").
[6] See Exhibit 2 “Permitted and Prohibited Rights-of-Way Management Functions."

levels for telecommunications providers and services. When local governments seek to assert broad regulatory authority over telecommunications providers, they undercut the role and responsibilities of the federal government.

III. Barriers to Entry are Real and Should Not be Downplayed.

In their continued attempts to undermine the industry's claim that some local governments create unlawful barriers to entry, the Opposing Local Government Commentors cite to the small number of complaints filed with the FCC, claiming these are insufficient to show a significant industry-wide concern. However, this mischaracterization ignores the numerous court decisions that have addressed both permissible and unlawful rights-of-way management functions, litigation that could have been avoided if those local governments had not imposed such barriers. Moreover, each of these lawsuits itself created further costs and delays for providers. The Opposing Local Government Commentors also overlook the hundreds of letters that IROW and industry members have sent to state and local governments along with the countless hours spent meeting with state and local government to prevent unlawful requirements from being imposed. All of this evidence does indicate that the Commission must ensure that state and local governments cannot create additional barriers to entry that would inhibit the timely build-out and provisioning of broadband and other advanced telecommunications.

IROW has chosen not to publicize each specific circumstance where its members have encountered difficulty accessing rights-of-way, out of concern

over their ongoing relationships and negotiations with these local governments. This should not be misinterpreted to imply that the examples of such problems are few or insignificant. To the contrary, IROW members continue to battle a multitude of creative attempts by local governments to impose unlawful measures. Moreover, the fact that broadband deployment continues to progress is by no means confirmation that all local government action has been reasonable. In many cases, IROW members have encountered trouble negotiating with various local governments along their deployment route, which has caused sometimes months and years of delay in that deployment, despite the fact that those carriers were ultimately able to install their facilities.

IV. Fees Should Constitute Only Fair and Reasonable Compensation, on a Competitively Neutral and Nondiscriminatory Basis for the Use of the Public Rights-of-Way.

Even more troubling than the Opposing Local Government Commentors' contention that progressing deployment means local governments are not creating barriers, they take the view that they may impose fees that exceed recovery of their costs and generate profits. Numerous local governments continue to aver that a requirement for fair and reasonable compensation means that they can impose a revenue-based tax on telecommunications providers. Premised upon their monopoly control of rights-of-way as limited and scarce resources, some local governments claim they are entitled to profit from them. The fallacies of this logic abound.

Section 253 of the Telecommunications Act was designed to “eliminate

barriers to entry" that might be erected by state and local governments, not to create new ones. The purpose of the Act was to promote robust competition, and in recognition of such, Congress wanted to ensure that local governments would not create unnecessary obstacles that would effectively limit, or in extreme cases, prohibit competition and the deployment of new technologies.[7] And yet, the fair and reasonable compensation language in the savings clause of section 253(c) has sparked enormous debate. On the one hand, local governments aver that they are free to charge revenue-producing fees, while telecommunication providers say otherwise.

The Commission should ensure that "fair and reasonable compensation ... for use of public rights of way" under Section 253(c) is limited to fees that recover the locality's administrative costs of managing such use, as Congress envisioned. Cost recovery for expenses incurred by the local government as a result of excavations, inspections, implementation of the permitting process, and other matters incidental to the right-of-way usage constitutes fair and reasonable compensation.[8] Without such clarity the disputes, legal challenges, and deployment delays will continue. Additionally, under many state laws, local governments may not charge in excess of costs, and any such charge would not

[7] "Section 253 is a critical component of Congress' pro-competitive deregulatory national policy framework that it put into place by enacting the 1996 Act…. Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers, and by preempting under Section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals." *In re TCI Cablevision of Oakland County, Inc.,*1997 WL 580831 (F.C.C.) ¶102, 12 F.C.C.R. 21,396, 12 FCC Rcd. 21,396.

[8] *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 587-88, 593 (N.D. Tex. 1998)*, vacated as moot due to subsequent statute,* 243 F.3d 928 (5th Cir. 2001)*; Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 808-11, 814*, vacated and remanded on other grounds,* 212 F.3d 863 (4th Cir. 2000).

only violate these state laws but violate vested constitutionally protected rights.[9]

Fees in excess of costs have no boundaries, and if allowed, can negatively impact broadband deployment in the following ways:

- ❖ Revenue-generating fees will continue to depress competition.
- ❖ Revenue-generating fees will drive uneven deployment creating a patchwork quilt of competitive networks.
- ❖ Multiplying revenue-based fees by the thousands of local communities that a provider's network must pass through will exponentially increase the cost structure of building out a network, thereby dramatically affecting rates to consumers.
- ❖ Robust deployment will occur only in economically feasible, and thereby limited, areas.

Conclusion

In this proceeding, the Commission seeks comment on the best practices for management of the public rights-of-way.[10] IROW proposes its Recommended Measures, as outlined in Exhibit 1, be used to ensure that telecommunications providers obtain timely access to the public rights-of-way and that "fair and reasonable compensation" does not exceed the actual and direct costs incurred by a jurisdiction arising from managing a provider's access to the public rights-of-

[9] In many cases, providers have vested contracts with the state that are constitutionally protected and cannot be taken away. *Pac. Tel. & Tel. Co. v. City and County of San Francisco*, 51 Cal.2d 766, 771 (1959); *Pac. Tel. & Tel. Co. v. City of Los Angeles,* 44 Cal.2d 272, 276 (1955); *Los Angeles County v. So. Cal. Tel. Co.*, 32 Cal.2d 378, 384 (1948); *Postal Telegraph-Cable Co. v. City and County of Los Angeles*, 164 Cal. 156, 159-160 (1912); *Russell v. Sebastian*, 233 U.S. 195, 205-208 (1914); *TCG Detroit v. City of Dearborn*, 16 F.Supp.2d 785, 793-97 (E.D. Mich. 1988); *Southwestern Bell Tel. Co. v. City of Maryland Heights,* 4:99-CV-1052 (E.D. Mo. Sept. 23, 2002); *Southern Cal. Tel. Co.,* 32 Cal.2d 378, 385 (1948); *Southern Bell Tel & Tel Co. v. City of Meridian*, 131 So.2d 666 (MS 1961); *Lexington-Fayette Urban County Government v. BellSouth Telecommunications, Inc.,* 14 Fed. Appx. 636, 2001 WL 873629 (6th Cir. 2001); *City of Louisville v. Cumberland Tel and Tel Co*, 224 US 649 (1912).

[10] NOI ¶ 40.

way.

No amount of downplaying the ROW access problem will erase the harm done when broadband and telecommunications providers cannot timely provision advanced services due to local governments imposing unlawful requirements, including burdensome access requirements and revenue-generating tax-like fees. While this is not the case for the majority of jurisdictions, a small number of jurisdictions acting unlawfully can nonetheless cause havoc by their enormous impact on the overall nationwide or region-wide build-out plans of carriers.

Moreover, even while the most egregious situations are limited to a small number of local governments, other local governments are watching and waiting. If revenue generation or the imposition of onerous requirements are allowed by the courts or this Commission, through acquiescence or otherwise, governmental entities will not likely restrain themselves from leveraging ROW access as a new source of revenue or creating additional tiers of regulation. Therefore, barriers must be eliminated if we are to truly realize affordable technological advances that our industry can offer the public on a competitive basis.

IROW RECOMMENDED MEASURES
TO PROMOTE PUBLIC RIGHTS-OF-WAY ACCESS

- Access to public rights-of-way should be extended to all entities providing intrastate, interstate or international telecommunications or telecommunications services or deploying facilities to be used directly or indirectly in the provision of such services ("Providers").

- Government entities should act on a request for public rights-of-way access within a reasonable and fixed period of time from the date that the request for such access is submitted, or such request should be deemed approved.

- Fees charged for public rights-of-way access should reflect only the actual and direct costs incurred in managing the public rights-of-way and the amount of public rights-of-way actually used by the Provider. In-kind contributions for access to public rights-of-way should not be allowed.

- Consistent with the measures described herein and competitive neutrality, all Providers, including government owned networks, should be treated uniformly with respect to terms and conditions of access to public rights-of-way, including with respect to the application of cost-based fees.

- Entities that do not have physical facilities in, require access to, or actually use the public rights-of-way, such as resellers and lessees of network elements from facilities-based Providers, should not be subject to public rights-of-way management practices or fees.

- Rights-of-way authorizations containing terms, qualification procedures, or other requirements unrelated to the actual management of the public rights-of-way are inappropriate.

- Industry-based criteria should be used to guide the development of any engineering standards involving the placement of Provider facilities and equipment.

- Waivers of the right to challenge the lawfulness of particular governmental requirements as a condition of receiving public rights-of-way access should be invalid. Providers should have the right to bring existing agreements, franchises, and permits into compliance with the law.

- Providers should have a private right of action to challenge public rights-of-way management practices and fees, even to the extent such practices and fees do not rise to the level of prohibiting the Provider from providing service.

- The Federal Communication Commission should vigorously enforce existing law and use expedited procedures for resolving preemption petitions involving access to public rights-of-way.

Permitted and Prohibited Rights-of-Way Management Functions

Permitted ROW Management Functions:

1. ***Coordination of construction schedules***.
   BellSouth Telecommunications, Inc. v. Town of Palm Beach, 127 F. Supp. 2d 1348, 1352 (S.D. Fla. 1999), *aff'd in part, rev'd in part*, 252 F.3d 1169 (11th Cir. 2001); *BellSouth Telecommunications, Inc. v. City of Coral Springs,* 42 F. Supp. 2d 1304, 1309 (S.D. Fla. 1999); *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, 21441 (1997) [hereinafter *TCI Cablevision*]; *In re Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 F.C.C.R. 20227, 20246 (1996) [hereinafter *Open Video Systems*].

2. ***Reasonable insurance, bonding and indemnity requirements to ensure appropriate restoration of rights-of-wa***y.
   TCG New York, Inc. v. City of White Plains, 125 F. Supp. 2d 81, 91 (S.D.N.Y. 2000), *aff'd in part, rev'd in part*, 305 F.3d 67 (2d Cir. 2002); *Town of Palm Beach*, 127 F.Supp.2d at 1352; *TCI Cablevision*, 12 F.C.C.R. at 21441; *Open Video Systems*, 11 F.C.C.R. at 20227.

3. ***The tracking of multiple systems that use the rights-of-way to prevent interference among them.***
   TCI Cablevision, 12 F.C.C.R. at 21441

4. ***General time, place and manner of construction regulations.***
   TCG New York, Inc., 125 F. Supp. 2d at 90 (relying on the FCC's limitations on local management of rights-of-way); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591-92 (N.D. Tex. 1998), *vacated as moot due to subsequent statute,* 243 F.3d 928 (5th Cir. 2001) (described as reasonable right-of-way regulation); *City & County of Denver v. Qwest Corp*., 18 P.3d 748, 761-62 (Colo. 2001)(upheld under state law similar to Section 253); *New Jersey Payphone Ass'n v. Town of West New York*, 130 F. Supp. 2d 631, 637 (D.N.J. 2001), *aff'd* 299 F.3d 235 (3d Cir. 2002) (general location requirements); *PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409 at *19-20 (E.D. Pa. 1999) (included noise regulations).

5. ***Permit fees and fees directly related to the municipality's costs incurred as a result of the telecommunications provider's ROW use.***

   City of Auburn v. Qwest Corp., 260 F.3d 1160, 1176 (9th Cir. 2001); *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F.Supp.2d 1261, 1270 (S.D. Ala. 2001); *AT&T Communications of the Southwest, Inc.*, 8 F. Supp. 2d at 592-93; *Open Video Systems*, 11 F.C.C.R. at 20227. *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 808-11, 814*, vacated and remanded on other grounds,* 212 F.3d 863 (4th Cir. 2000), *XO Missouri, Inc. v. City of* Maryland Heights, 362 F.3d 1023, 2004 U.S. App. LEXIS 6079 (8th Cir. 2004).

6. ***Timely issuance of permits prior to excavations or construction work.***
   City of Mobile, 171 F.Supp.2d 1261, 1270.

7. ***Vehicular and pedestrian traffic regulations.***
   New Jersey Payphone Ass'n, 130 F. Supp. 2d at 637; *TCI Cablevision*, 12 F.C.C.R. at 21441.

8. ***Requirements to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation.***
   City of Auburn, 260 F.3d at 1177 (quoting legislative history).

9. ***Applicant contact information***
   TCG New York, Inc., 125 F. Supp. 2d at 90.

10. ***Description of the proposed construction area***
    TCG New York, Inc., 125 F. Supp. 2d at 90-91.

11. ***Proposed construction schedule and construction map***
    TCG New York, Inc., 125 F. Supp. 2d at 91.

Prohibited Regulations That Exceed Authority to Manage ROW:

1. ***Onerous application and permit processes***
   City of Auburn v. Qwest Corp., 260 F.3d 1160, 1178 (9th Cir. 2001); *Bd. of County Comm'rs v. Qwest Corp.*, 169 F. Supp. 2d 1243, 1248, (D.N.M. 2001); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1098-1100 (N.D. Cal. 2001) (application and permit required the submission of the identity and legal status of carrier, a map and description of existing and proposed encroachments, a description of the services, 3 year business plan, technical qualification, information to establish applicant has all governmental approvals, convictions and violations of law, and all information deemed necessary by city); *TCG New York, Inc. v. City of White Plains,* 125 F. Supp. 2d 81, 91 (S.D.N.Y. 2000), *aff'd in part, rev'd in part*, 305 F.3d 67 (2d Cir. 2002); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 587-88, 593 (N.D. Tex. 1998)*, vacated as moot due to subsequent statute,* 243 F.3d 928 (5th Cir. 2001)*; Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 808-11, 814*, vacated and remanded on other grounds,* 212 F.3d 863 (4th Cir. 2000)

2. **Requirement to describe services**
   *City of Auburn***,** 260 F.3d 1160, 1178; *Qwest Communications Corp.*, 146 F. Supp. 2d at 1098-99; *TCG New York, Inc.*, 125 F. Supp. 2d at 91.

3. ***Proof of financial, technical and legal qualifications***
   City of Auburn, 260 F.3d 1178; *Qwest Communications Corp. v.*, 146 F. Supp. 2d at 1098-99; *New Jersey Payphone Assn. v. Town of West New York***,** 130 F. Supp. 2d 631, 639 (D.N.J. 2001) (experience of the payphone provider a barrier to entry), *aff'd* 299 F.3d 235 (3d Cir. 2002); *TCG New York, Inc.*, 125 F. Supp. 2d at 91; *AT&T Communications of the Southwest, Inc.*, 8 F. Supp. 2d at 593.

4. ***Franchising provisions which the local government deems necessary in the public interest***
   City of Auburn, 260 F.3d at 1178*;TCG New York, Inc.*, 125 F. Supp. 2d at 92-93 (striking city's discretion to approve franchise only if city found to be in public interest*); Qwest Communications Corp.*, 146 F.Supp.2d 1097 (prohibiting the consideration of "such other factors" and information as city wished).

5. ***Unfettered discretion to approve or deny a franchise***
City of Auburn, 260 F.3d at 1176 (described by the court as the "the ultimate cudgel"); *Bd. of County Comm'rs*, 169 F. Supp. 2d at 1248; *Qwest Communications,* 146 F. Supp. 2d at 1098-1099*; New Jersey Payphone* Ass'n*.*, 130 F. Supp. 2d at 637 (exclusive franchise is incompatible with §253; power to deny permission to use right-of-way must be tied to right-of-way management concerns and not left to the unguided discretion of Town officials; prohibiting unfettered discretion of the town to change the rules granting access to the rights-of-way); *TCG New York, Inc.*, 125 F. Supp. 2d at 92; *PECO Energy Co. v. Township of Haverford,* 1999 WL 1240941, *6 (E.D. Penn. 1999); *AT&T Communications of the Southwest, Inc.*, 8 F. Supp. 2d at 592-93; *Bell Atlantic-Maryland, Inc.*, 49 F. Supp. 2d at 808-11, 814; *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1310 (S.D. Fla. 1999).

6. ***Fees that exceed the actual costs incurred for the management of the public right-of-way***
City of Auburn v. Qwest Corp., 260 F.3d 1160, 1176 (9th Cir. 2001); *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F.Supp.2d 1261, 1270 (S.D. Ala. 2001); *AT&T Communications of the Southwest, Inc.*, 8 F. Supp. 2d at 592-93; *Open Video Systems*, 11 F.C.C.R. at 20227 *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 808-11, 814*, vacated and remanded on other grounds,* 212 F.3d 863 (4th Cir. 2000), *XO Missouri, Inc. v. City of Maryland Heights*, 362 F.3d 1023, 2004 U.S. App. LEXIS 6079 (8th Cir. 2004)..

7. ***Inspection of records and reporting requirements beyond that needed to enforce valid right-of-way regulations***
City of Auburn, 260 F.3d at 1178; *Bd. of County Comm'rs*, 169 F. Supp. 2d at 1248; *Qwest Communications Corp.*, 146 F. Supp. 2d at 1098-1099 (prohibiting a requirement that the company report any person who has *leased* capacity on the company's network and other general reporting requirements); *TCG New York, Inc.*, 125 F. Supp. 2d at 92, 94 (City's limited authority does not give it the power to micromanage TCG's business records, unless they are directly related to the rights-of-way or a proper fee, thus striking down requirements for maintenance of books concerning TCG's operations, audit rights of financial records, and other information at City's request); *AT&T Communications of the Southwest, Inc.*, 8 F. Supp. 2d at 588 (requesting detailed audits of AT&T's financial and other records and notice to the City of all communications with FCC,SEC and PUC regarding service in city); *BellSouth Telecommunications, Inc.*, 42 F. Supp. 2d at 1308-09 (striking requirements for information regarding systems, plans, or purposes of telecommunications facilities); *Bell Atlantic-Maryland, Inc.*, 49 F. Supp. 2d at 808-11, 814.

8. ***Requirement to waive legal challenges***
TCG New York, Inc., 125 F. Supp. 2d at 94.

9. ***Names and addresses of all persons with whom the carrier has an agreement for use of its facilities***
Qwest Communications Corp., 146 F.Supp.2d at 1098-99.

10. ***Most favored nations provisions for most favorable rates and terms***
TCG New York, Inc., 125 F. Supp. 2d at 94; *City of Auburn*, 260 F.3d at 1178-79; *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, 21441 ¶105 (1997).

11. Requirements to provide the locality with free fiber and conduit capacity
City of Auburn, 260 F.3d at 1179; *AT&T Communications of the Southwest, Inc.*, 8 F. Supp. 2d at 593; *but see TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625-26 (6th Cir. 2000) (finding that installed conduit could be received in lieu of a right-of-way fee).

12. Service regulations
See City of Auburn, 260 F.3d at 1179; *Bell Atlantic-Maryland, Inc.*, 49 F. Supp. 2d at 817; *BellSouth Telecommunications, Inc.*, 42 F. Supp. 2d at 1310; *AT&T Communications of the Southwest, Inc.*, 8 F. Supp. 2d at 593; *PECO v. Energy Co.*, 1999 U.S. Dist. LEXIS 19409 at *20-23.

13. Equal Employment Opportunity Provisions
AT&T Communications of the Southwest, Inc. v. City of Austin, 975 F. Supp. 928, 935 (W.D.Tex. 1997), vacated as moot due to subsequent statute, 235 F.3d 241 (5th Cir. 2000).

VELOCITA

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August 21, 2002

Local and State Government Advisory Committee
c/o Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
3773 Cherry Creek N. Drive, Suite 900
Denver, CO 80209

Re: LSGAC Correspondence to IROW

Dear Mr. Fellman:

I write in response to your letter to Scott Thompson, dated August 7, 2002, wherein you address recent efforts by the Local and State Government Advisory Committee ("LSGAC") and the Industry Rights-of-Way Working Group ("IROW") to initiate a dialogue regarding impediments to public rights-of-way access that have delayed deployment of broadband networks around the country, including the nationwide network that Velocita Corporation is seeking to complete. Insofar as Velocita was one of the companies represented at the May 17, 2002, meeting among the members of IROW and the LSGAC, we feel compelled to respond to certain statements made in your letter.

By way of background, Velocita is a start-up competitive broadband company that is seeking to construct a nationwide long distance facilities-based fiber optic cable network. During the past three years, the company has overcome a number of obstacles and has successfully installed over sixty-two hundred miles of telecommunication facilities in thirty-five states. But the network is not completed. Gaps exist in those areas in which we have not been able to negotiate rights-of-way access. If completed, this national network would have the ability to engage in the type of competition envisioned by the Telecommunications Act, that of offering service to traditional local service customers, traditional and emerging interexchange carriers, local and regional exchange carriers, wireless carriers, internet service providers, data-intensive corporate entities, as well as local, state and federal government customers. Nonetheless, despite diligent effort and the expenditure of $500 million, Velocita is currently struggling to financially survive. One of the principal causes of the difficulty has been the inability to obtain local governmental permission to access certain critical public rights-of-way needed to complete the network and derive a revenue stream.

In your letter, you assert that before LSGAC will be willing to discuss solutions to the "alleged problems" identified by IROW, you expect first to engage in a lengthy factual inquiry "to determine whether these problems actually [exist]." Let me assure you, Velocita's bankrupty is a testament to the fact that the problem of rights-of-way access is both severe and immediate. Unreasonable delay and excessive fees imposed by a minority of local government entities is,

and has been, the number one impediment to deployment of Velocita's nationwide network. Over the course of the past several years Velocita, and a host of other companies, have documented these concerns in numerous filings with the Federal Communications Commission ("FCC") and the National Telecommunications and Information Administration ("NTIA"). Responding to the assertion by members of LSGAC at the May 17 meeting that the industry's problems were new to them, please be reminded that our attorneys provided, to you personally, links to comments Velocita had filed with the FCC's 706 docket in October of 2001. Similar comments by other telecommunications providers are also on record with the FCC. The most distressing fact is that over the last several years, there has been extensive litigation in both State and Federal courts under Section 253 of the Telecommunications Act regarding impediments to rights-of-way access. LSGAC members have participated in, or been privy to, many of these cases. It is simply disingenuous to assert that the issues are new and that no solutions can be found unless IROW is willing "to start the discussions at the beginning."

Velocita's principal areas of concern are: (1) unreasonable delay in obtaining rights-of-way access, and (2) excessive rights-of-way access fees. Your letter states that unreasonable delay is sometimes occasioned by incomplete or erroneous permit applications and, therefore, one should not expect a national rule that requires a permit to be granted in a limited, fixed period of time. I feel your rhetoric is an attempt to cloud the issue. You must clearly know that if the application is incomplete or erroneous, the permit can be denied within the fixed period of time allotted, and the party at fault would then be relegated to refiling a corrected application with no complaint on the issue of delay. Velocita's complaint is not with delays generated by legitimate rights-of-way management standards raised or imposed by local government. We are concerned with the unfair and unlawful situation whereby a local government takes the position that our application and constructions plans will not be examined until we tender fees that exceed reasonable compensation.

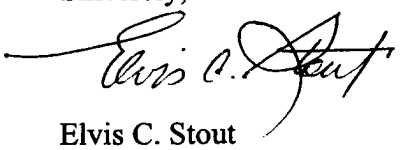
Velocita is of the opinion that consumers are being damaged by local government actions that delay broadband deployment. Your letter states that LSGAC claims "consumers are being damaged by unreasonable public subsidies to private corporations." Velocita has never asked for subsidies, but, on the contrary, proposes to every city a full reimbursement of actual and direct costs that result from use of the rights-of-way for our public utility telecommunication facilities. It is Velocita's position that the local taxpayer should not have to fund any part of our construction, but should have the opportunity to enjoy the results of competitive telecommunications services. From a public interest view, Velocita stands ready to contribute at least as much as do other public rights-of-way users that traverse city streets each day without the demand of exorbitant fees. By requiring as a matter of national policy that public rights-of-way managers act on permit requests within a reasonable, fixed time period and charge fees based on the direct and actual costs of telecommunications providers' rights-of-way use, timely and cost-viable broadband deployment would be enabled and lower costs for a variety of telecommunication services would result.

Your letter suggests that IROW and the LSGAC correspond without copying FCC staff or Commissioners. Velocita disagrees. Our position is that the FCC must act to resolve this issue because of its nationwide impact and the infeasibility of litigating the issue with each and every

recalcitrant jurisdiction. This is particularly so in view of the fact that some cities have refused to follow judicial decisions interpreting Section 253 of the Telecommunications Act, thus necessitating multiple lawsuits even where there is clear judicial guidance on an issue. For this reason, we propose, again, that the FCC open a public docket in which both sides can file their comments, for the record, thus obviating the need for further letters between our two groups. Indeed, Velocita must reluctantly agree, given LSGAC's unwillingness to take as a starting point the many proceedings in which these issues already have been documented, that, as your letter asserts "any communications between us will be unproductive." Again, speaking for Velocita, it appears our efforts at productive dialogue have been exhausted.

Finally, your letter notes that since IROW's inception, five of our members have gone into bankruptcy. While impediments to rights-of-way access and the resulting delay in deployment and completion of planned telecommunications facilities are not the only reason that telecommunications providers are struggling financially, we can attest that the rights-of-way access problem has been a significant factor contributing to Velocita's bankruptcy. Absent the barriers created by a minority of governmental entities, our nationwide network would have been completed by now, we would be generating revenue, and Velocita's financial picture would be quite different. We can only hope that LSGAC and other groups representing state and local government interests will recognize the important role they play in facilitating broadband deployment, as well as competition among service providers, and that they will take action to address the concerns raised by IROW, before further harm occurs to the industry and to consumers.

Sincerely,



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